



भारत का राजपत्र The Gazette of India

प्राधिकार से प्रकाशित
PUBLISHED BY AUTHORITY

सं. 5]
No. 5]

नई दिल्ली, शनिवार, फरवरी 1, 1997/माघ 12, 1918
NEW DELHI, SATURDAY, FEBRUARY 1, 1997/MAGHA 12, 1918

इस भाग में भिन्न पृष्ठ संख्या दी जाती है जिससे कि यह अलग संकलन के रूप में
रखा जा सके

Separate Paging is given to this Part in order that it may be filed as a
separate compilation

भाग II—खण्ड 3—उप-खण्ड (iii)
PART II—Section 3—Sub-section (iii)

केन्द्रीय अधिकारियों (संघ राज्य क्षेत्र प्रशासनों को छोड़कर) द्वारा जारी किये गये आदेश और अधिसूचनाएँ
Orders and Notifications issued by Central Authorities (other than the Administrations of Union Territories)

भारत निर्वाचन आयोग

नई दिल्ली, 15 जनवरी, 1997

भा.प्र. 26.—लोक प्रतिनिधित्व अधिनियम, 1951
(1951 का 43), की धारा 106 के अनुसरण में, निर्वाचन
आयोग ऐतद्वारा लोक सभा के लिए 1-दमन व दीव संसदीय
निर्वाचन-क्षेत्र से निर्वाचन लड़ने वाले अभ्यर्थी, श्री गोपाल
भाई के. टण्डेल के निर्वाचन को चुनौती देने वाली 1996
की निर्वाचन प्रतीति सं. 2 में, मुम्बई उच्च न्यायालय (मुम्बई)
के तारीख 1 जुलाई, 1996 के निर्णय को प्रकाशित करता
है।

(निर्णय अधिसूचना के अंग्रेजी भाग में छपा है)

[सं. 82/द.दी./2/96(मुम्बई)]

आदेश से,
वायू राय, सचिव

ELECTION COMMISSION OF INDIA

New Delhi, the 15th January, 1997

O.N. 26.—In pursuance of Section 106 of the Representation of the People Act, 1951 (43 of 1951), the Election Commission hereby publishes the judgement dated 1st July, 1996 of the High Court of Judicature at Mumbai (Mumbai) in Election Petition No. 2 of 1996 calling in question the election of Shri Gopalbhai K. Tandel to the House of the People from 1-Daman & Diu Parliamentary Constituency.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
(Election Petition No. 2 of 1996)

Devjibhai J. Tandel

..Petitioner.

Vs.

Gopalbhai K. Tandel and another
Mr. M. N. Vepari for the Petitioner.

Respondents.

CORAM : K. G. Shah, J.

Date : 1-7-1996.

ORAL ORDER

1. By this election petition filed under sections 80/81 of the Representation of Peoples Act, 1951 the petitioner has prayed for the following main reliefs :

- (a) To declare the election of the first Respondent to the House of People from the '1-Daman and Diu Parliamentary Constituency' in the Union Territory of Daman and Diu, held in May 1996 as void.
- (b) To declare that the Respondent No. 1, the returned candidate Shri Gopalbhai Kalyanbhai Tandel indulged in corrupt practices and hence is disqualified to contest such elections for a period of six years.
- (c) To declare the petitioner to have been duly elected to the said seat of House of People from the '1-Daman and Diu Parliamentary Constituency' in Union Territory of Daman and Diu.

2. The petitioner, respondent No. 1 and 7 others contested the election to the House of Parliament. 11th Lok Sabha from 1-Daman and Diu Parliamentary Constituency in the Union Territory of Daman and Diu held on 2nd May, 1996. The result of the election was declared on 8th May, 1996. In the petition, the petitioner has joined the returned candidate as respondent No. 1 and the Returning Officer as respondent No. 2. No other person has been joined as a respondent to the petition.

3. As is clear from the prayer contained in para 25(c) extracted hereinabove, that the petitioner has, in addition to prayer for a declaration of voidness in respect of the election of respondent No. 1 also prayed for a declaration that he be declared to have been duly elected to the said seat of House of Parliament from the constituency in question. Section 80 of the Representation of Peoples Act, 1951 ("the Act" for short) says that no election shall be called in question except by an election petition presented in accordance with the provisions of Part VI of the Act. Section 81 of the Act deals with the presentation of the petition and section 82 of the Act deals with the parties to the petition. That section 82 may be reproduced.

"82. Parties to the petition.—A petitioner shall join as respondents to his petition—

- (a) where the petitioner, in addition to claiming a declaration that the election of all or any of the returned candidates is void, claims a further declaration that he himself or any other candidate has been duly elected, all the contesting candidates other than the petitioner, and where no such further declaration is claimed, all the returned candidates; and
- (b) any other candidate against whom allegations of any corrupt practice are made in the petition."

4. Section 86 of the Act says that the High Court shall dismiss an election petition which does not comply with the provisions of Section 81 or 82 or 117 of the Act. Section 82 of the Act which I have excerpted hereinabove clearly posits that the petitioner shall join as respondents to his petition, where the petitioner in addition to claiming a declaration that the election of all or any of the returned candidate is void. Claims a further declaration that he himself

or any other candidate has been duly elected, all the contesting candidates other than the petitioner, and where no such further declaration is claimed, all the returned candidates. This section makes it abundantly clear that where the petitioner in addition to claiming a declaration about voidness of the election of the returned candidate claims a further declaration that he himself or any other candidate has been duly elected he shall join all the contesting candidates other than himself. In the present case, the petitioner has claimed such a further declaration as is contemplated by section 82(a) of the Act. He was therefore required to join all the 8 remaining candidates (9 minus himself) as respondents to the petition. He has not done that. He has joined only the returned candidate as respondent No. 1 and the Returning Officer as respondent No. 2. Seven candidates who contested the election have been left out and the petitioner has prayed a further declaration that he be declared elected.

5. Thus there is clear non-compliance of section 82 of the Act. Consequence of such a non-compliance is a mandatory dismissal of the petition under Section 86 of the Act. In view of this, the learned counsel for the petitioner seeks permission to withdraw the relief contained in para 25(c) of the petition. That request also cannot be granted.

6. That this petition is liable to be dismissed at the threshold is clear from the judgment of this court rendered on 7th July, 1995 in Election Petition No. 14 of 1995 (Comrade Kallappa L. Malabade v. Prakash K. Awade). The case on hand before me is exactly identical with the case which was before me in this court in Election Petition No. 14 of 1995. There also in all 7 persons contested the election. The petitioner of that case had joined only the returned candidate and had left out 5 others who had contested the election though the petitioner of that case had prayed for a further declaration that he be declared elected. In that judgment, this court has, following the three Supreme Court judges held that the petition was liable to be rejected under section 86(1) of the Act. Those judgments are (1) Mohan Raj v. Surendra Kumar Taparia AIR 1969 SC 677, (2) K. Kamaraja Nadar v. Kunju Thevar AIR 1958 SC 687, and (3) Mallappa Basappa v. Basavraj Ayyappa—1958 SC 698. In the case of Mohan Raj, one R. D. Periwal was also a person who had filed his nomination. However later on he had withdrawn his nomination and then he had acted as the election agent of the returned candidate. In the election petition that came to be filed that R. D. Periwal had not been joined as party respondent though of course certain allegation of corrupt practice had been made against him in the election petition. When a contention based on section 86 read with 82 of the Act was raised, on behalf the petitioner the allegations of corrupt practices levelled against Periwal as also the references to his name in the petition were sought to be withdrawn. In that context. Their Lordships of the Supreme Court considered the applicability of Order 6 Rule 17 and Order 1 Rule 10 of the Code of Civil Procedure to the election petition under the Act. The Supreme Court in that context held as follows :

"No doubt the power of amendment is preserved to the Court and O.1 R.10 enables the Court to strike out parties but the Court cannot use O.6 R.17 or O.1 R.10 to avoid the consequences of non-joinder for which a special provision is to be found in the Act. The Court can order an amendment and even strike out a party who is not necessary. But when the Act makes a person a necessary

ssary party and provides that the petition shall be dismissed if such a party is not joined, the power of amendment or to strike out parties cannot be used at all. The Civil Procedure Code applies subject to the provisions of the Representation of the People Act and any rules made thereunder. When the Act enjoins penalty of dismissal of the petition for non-joinder of a party the provisions of the Civil Procedure Code cannot be used as curative means to save the petition."

7. In *K. Kumaraj Nadar's case* (supra) at para 33 of the report, this is what Their Lordships of the Supreme Court have held :

"As regards the amendment of a petition by deleting the averments and the prayer regarding the declaration that either the petitioner or any other candidate has been duly elected, so as to cure the defect of non-joinder of the necessary parties as respondents, we may only refer to our judgment about to be delivered in *Mallappa Basappa v. Basavaraj Ayyappa*, Civil Appeal No. 76 of 1958 : (AIR 1958 S.C. 698) where the question is discussed at considerable length. Suffice it to say here that the Election Tribunal has no power to grant such an amendment be it by way of withdrawal or abandonment of a part of the claim or otherwise, once an Election Petition has been presented to the Election Commission claiming such further declaration."

8. Even in the case of *Mallappa Basappa* it has been held that there is no power in the Election Commission to allow a petitioner to withdraw or abandon a part of his claim either by having resort to the provisions of Order 23 Rule 1 of the Code of Civil Procedure or otherwise. Thus these three judgements of the Supreme Court, which I have referred to in the case of *Comrade Kaliappa L. Malabade* (Election Petition No. 14 of 1995), put the matter beyond the pale of any controversy and it is required to be held that once in an election petition a further declaration as contemplated by section 82(1) of the Act is claimed and all the contesting candidates are not joined as party respondents, the election petition is required to be dismissed under section 86(1) of the Act and even the request of the petition to delete the prayer for such a further declaration cannot be granted.

9. The learned counsel for the petitioner, however, placed reliance upon the decision in the case of *Shiv Chand v. Ujagar Singh* (62 Election Law Report 316). Having gone through that judgment, I think that judgment does not help the petitioner. That judgment stands on a different set of facts. There at the election in question, there were quite a few candidates including one *Shri Mal Singh* who it appeared had retired from the contest for the seat although duly nominated as a candidate. The respondent was a returned candidate and the petitioner was a disappointed candidate. In the petition the petitioner had made certain allegations of corrupt practices both against the returned candidate as also *Mal Singh*. That *Mal Singh* was not joined as a party respondent to the petition. The respondent to the petition in his written statement raised a preliminary objection that the failure to join *Mal Singh* as the respondent entail dismissal of the election petition. Thereafter the election petitioner filed an interlocutory application under Order I Rule 10(2), Order 6 Rule 17 and Section 151 of the Code of Civil Procedure seeking to implead as respondent No. 2 the said

Mal Singh. In the alternative, he prayed for deletion of the allegation of corrupt practice against *Mal Singh*. On the same day, *Mal Singh* also filed an application under Section 86(4) of the Act praying that he be impleaded as respondent to the election petition. Thus there was a motion for impleadment by the election petitioner as well as by *Mal Singh* and they were disposed of together by an order which was under appeal before the Supreme Court. Their Lordships of the Supreme Court said that it was fairly clear that *Mal Singh* was a necessary party since a corrupt practice was imputed to him. He made an application to be impleaded as a respondent exercising the procedural right he had under Section 86(4) of the Act. The Supreme Court found that *Mal Singh's* application under Section 86(4) of the Act was required to be allowed for that section gave *Mal Singh* a right entitling him to come to the court with an application for being joined as a party respondent. Their Lordships have in clear terms said as follows :

"We do not propose to examine the discretionary dismissal of the application by the election petitioner under Order 1 Rule 10 et al, to implead *Shri Mal Singh*. We confine ourselves to S. 86(1) and S. 86(4) of the Act."

Thus it is clear that under Section 86(4) of the Act, *Mal Singh's* right to be impleaded as a party respondent to the petition was upheld and once *Mal Singh* was impleaded, the bar of non-joinder vanished and the petition no longer remained liable to be dismissed under Section 86(1) of the Act.

10. The facts of the case before me are quite different. Here I am not concerned with a case where a person, who is a necessary party to the petition and who has been omitted from the array of parties to the petition, has come to the court with an application under Section 86(4) of the Act claiming to be joined as party respondent to this petition. Here the fatal flaw from which the petition suffers is that the remaining 7 candidates have not been joined as parties to the petition and yet the petitioner has prayed for a further declaration that he be declared elected. Now let us assume a case that following the decision in *Shiv Chand's case* relied upon by the learned counsel for the petitioner, this petition is held not liable to be dismissed under Section 86 of the Act, and ultimately the petitioner succeeds on the petition as it is meaning thereby the petitioner succeeds in convincing the court that he is also entitled to a further declaration that he is the elected candidate, the result of such a course being followed would be that 7 candidates who contested the elections would go unheard. If the election of respondent No. 1 is liable to be set aside and the matter was to end there, the matter would have stood on a different footing. But if the further declaration as claimed by the petitioner as per prayer 25(c) is to be granted, all the left out 7 candidates would have got to be before the court for the simple reason that may be the election of respondent No. 1 might be set aside. Nonetheless, the petitioner may not be required to be declared as elected candidate for there may be someone within the 7 left out candidates who might have secured higher number of votes than the petitioner and that left out candidate might have to be declared as an elected candidate. Such an exercise cannot certainly be done in absence of those 7 candidates who have been left out from the array of parties. It is in this view of the matter that I think the judgment in the case of *Shiv Chand v. Ujagar Singh* relied upon by the learned counsel for the petitioner cannot be invoked to the assistance of the petitioner.

11. Even in the case of Shiv Chand, the Supreme Court has referred to the decision in the case of Mohan Raj which I have relied upon in Election Petition No. 14 of 1995 and in that context Their Lordships of the Supreme Court have said as follows:

"The question raised there was whether the provisions of the Code of Civil Procedure, especially order 6 Rule 17 and Order 1 Rule 10 could be used in such a manner as to defeat the procedural policy and statutory imperative of S. 82 of the Act. Obviously that cannot be done because the provisions of the Representation of People Act where they lay down specific prescriptions must prevail and cannot be frustrated by importing the Code of Civil Procedure."

Thus the proposition enunciated in Mohan Raj's case has clearly been approved in the case of Shiv Chand. The facts in Shiv Chand's case were entirely different. Therefore the

proposition laid down in Shiv Chand's case does not help the petitioner in view of the three judgments of the Supreme Court referred to by me hereinabove.

12. In the above view of the matter, the request of the petitioner to withdraw the prayer contained in para 25(c) is rejected. The election petition is also rejected under Section 86(1) of the Act. The Election Commission and the Speaker of the Lok Sabha may be informed and the copy of the order be sent in terms of Section 103 of the Act read with Rule 19 of the High Court (O.S.) Rules, 1980. The amount of deposit of Rs. 2,000 be refunded to the petitioner.

Certified copy expedited.

[No. 83/D&D/2/96 (Mumbai)]

By Order,
BABU RAM, Secy.